Philadelphia *Star*, "that set aside a ball game where the score was 99 to 1 and required it to be played over again simply because the umpire made a mistake in his decision that affected one run? It might be clear that the game had been won on the merits and that the umpire's decision had not affected the result, and yet because he made one error the game would have to be played all over again."

And yet, as the *Star* adds, the Supreme Courts of many of our states are proceeding along analogous lines in reviewing the decisions of trial courts. It is a source of gratification and evidence of a coming reaction that the highest courts of Oklahoma, Wisconsin, New York, and other states have set themselves against the old view which often sacrificed justice to technicality, and have announced their determination to administer justice on the basis of reason and common sense. J. W. G.

Judicial Support of Technicalities.

The attitude of the New York Court of Appeals in the case referred to above is in refreshing contrast with that taken by the Supreme Court of Alabama in the recent case of the state against West, where a conviction for stealing hides was set aside because the indictment failed to state whether the aforesaid articles were mule, goat, cow, or sheep hides. The constitution of Alabama declares that in all criminal prosecutions the accused shall have the right to demand the nature and cause of the accusation, and in the judgment of the learned tribunal which was called upon to review the record of the trial court in this case, the thief, whose guilt had been established beyond all doubt and who had been sentenced to the penitentiary for a term of six years, had a constitutional right to more specific information concerning the kind of skins stolen in order that he might the better prepare to meet the charge against him. To an intelligent lay mind this is the veriest quibbling; it is simply trifling with justice, and it is such farcical performances as this that are doing so much to heap ridicule upon the legal profession and to bring our methods of judicial procedure into disrepute. Nevertheless, a writer in the Chicago *Legal News* undertakes to defend the Alabama Supreme Court from the charge of sacrificing justice to technicality. Indeed, he boldly asserts that this is not a *technicality* but a *fundamental principle* of the constitution and the law. "Now it must be apparent," he says, "that the mere charge of stealing some hides, without more, is simply equivalent to saying that West was guilty of stealing. It would obviously be as impossible for West

in the instant case safely to go into the trial, unless the kind of hides stolen were mentioned in the indictment as it would had the charge been the general one of *stealing animals* without mentioning whether they were *mules, goats, cows,* or *sheep,* and the state were permitted on the trial to prove that the defendant stole a *lot of animals.* There is no difference between the two cases. In either case he would be wholly unprepared to meet the vague and ambiguous charge." Again: "In order to properly instruct the jury, the indictment must inform the court of the kind of hides the defendant is charged with stealing. Inasmuch, however, as the circuit judge in Alabama did not know the indictment was bad on its face, he doubtless experienced no difficulty in instructing the jury on the simple question of stealing hides; that and nothing more, and so, the jury found a verdict against the defendant for stealing hides. Now, if West should be prosecuted again on the same charge of stealing hides, he could again and again be convicted, as his plea in bar could only mention hides and he could rely on the face of the indictment alone, and would not be permitted to eke out the charge in the previous indictment by parol, showing that the hides were the same in the latter as in the former prosecution. And thus one of the main safeguards which the prosecution throws around the accused, whether he be innocent or whether he be guilty, would be broken down."

This brand of argument strikes the layman very much like the logic of the Duchess in *Alice in Wonderland* where she says: "Never imagine yourself not to be otherwise than what it might appear to others that what you were or might have been was not otherwise than what you had been would have appeared to them to be otherwise."

Our advocate of this kind of "criminal" justice informs us that it has been determined in Missouri that an indictment which charges one with shooting at a mark on a public highway is defective unless it designates by name the particular highway (31 Mo. 349), and, he adds, "The various court reports are full of just such rulings." We regret to say that the last statement, to the shame of the law, is all too true. We commented in a previous number of this *Journal* on a recent decision of the Supreme Court of Missouri (*State v. Campbell,* 109 S. W. Reporter, p. 706) in which the conviction of a man for a dastardly crime was set aside because the article "the" was omitted from the indictment, thus indicating, as Samuel Scoville has remarked, that in Missouri the definite article "the" is of more importance than a man's honor or a woman's chastity. And this ruling was made in the face of a Missouri statute which declares

"that no indictment shall be deemed invalid for any fault or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits."

We rejoice to know, however, that there are respectable authorities in Missouri who repudiate the doctrine that the article "the" is an essential part of an indictment, and that its omission therefrom is a denial of due process of law. One of these is Frederick W. Lehmann of St. Louis, ex-president of the American Bar Association, whose remarks on the subject were printed in the last number of this *Journal*. "Had a mob assembled to lynch the fiend in this case," says Mr. Lehmann, "and I had appeared on the scene and pleaded with them to let the law take its course they would have said, 'We have no respect for a law which puts the definite article *the* in sanctity above the chastity of our wives and daughters.' Such things bring the law into contempt and disrepute and make you and me ashamed of it when we are arraigned at the bar of the common sense of mankind."

We have already called attention to the refusal of the Supreme Court of Oklahoma to grant a new trial because of the omission of the article "the," and the declaration of the court that it intended to do all in its power to place the jurisprudence of the state upon the broad and sure foundation of reason and justice. "We know," said the Court, "that there are respectable authorities holding to the contrary, but this Court will not follow any precedents unless we know and approve the reason upon which they are based—it matters not how numerous they may be, or how eminent the court by which they are promulgated." The Supreme Court of Wisconsin has taken the same enlightened view in a decision involving the validity of an indictment which omitted the useless phrase "against the peace and dignity of the state." "This formula," said the Court, "is a mere rhetorical flourish adding nothing to the substance of the indictment, and of course the accused cannot possibly be prejudiced or in any manner be misled by its omission from the indictment."

It is difficult to see how a court which seriously regards itself as an instrumentality for the administration of justice can take any other view of the matter. And yet the Supreme Court reports of many of our states are full of decisions overruling well-deserved convictions for the omission from the indictment of such words as "the," "there," "did," "and," the use of "or" instead of "and;" the slight misspelling of words; abbreviations, and the like. Some of the cases

in which justice has been delayed or defeated through such hair-splitting refinements were recently pointed out by Charles Brewer of the Maryland Bar in an article summarized in the September number of this *Journal*.

As an example of the way in which the requirement in regard to the choice of words in the indictment and the constitutional requirement that no one shall be twice placed in jeopardy for the same offense may be abused, Mr. Brewer cites the following case from South Carolina:

Two pianolas had been stolen. The indictment read "two pianos." Witnesses were brought in who testified that *pianolas* had been stolen, and not *pianos*, as charged. The indictment fell down and the accused was discharged. A vigilant district attorney was on hand, however, and promptly had the accused rearrested, charged with stealing two pianolas. The "shrewd" counsel defending the accused had a new set of witnesses this time—experts. The experts were able to convince the court that, after all, *pianolas and pianos were the same thing*. The court ruled that, having been tried once for stealing pianos, the accused could not twice be tried for the same offense. The fact that two musical instruments had been stolen seems to have been overlooked.

Other instances of a similar kind have been pointed out by Samuel Scoville of the Philadelphia Bar, and in an article summarized in the July number of this *Journal*. As an example of the style of logic which finds ready acceptance in some jurisdictions, Mr. Scoville cities a California case decided in 1904:

"An information was filed against A in which it was stated that A did unlawfully and feloniously commit an assault upon the person of B by means likely to produce great bodily injury— to-wit, with a heavy wooden stick. On an appeal to the Supreme Court the latter held that this information, although following the wording of the statute, was fatally defective because the means of injury were not described with sufficient precision. A layman might very well suppose that a heavy wooden stick could be understood as a means likely to produce great bodily injury; but the masterly reasoning of the Supreme Court of California disposes of any such fallacy, as follows:

"'Describing a stick as "heavy" imparts no certain information; the term is relative; a stick which in the hands of a boy or a feeble person would be considered heavy, in the hands of a robust person would be deemed light. Again, it might be heavy and yet so large and unwieldy as to be useless in the hands of a powerful man toward the commission of an assault. It might, too, be heavy and yet so small or short that no danger of bodily harm could reasonably be apprehended from its use. Aside from the use of the term "heavy" there is no description in the information as to the definite weight, strength or size of the stick, or other qualities, properties or characteristics showing that it was a means likely to produce great bodily injury.'

"Under this decision," observes Mr. Scoville, "it is undoubtedly the duty of any citizen of California who expects to be assaulted with a stick to provide himself with a tape-measure and pocket scales, nor to forget, immediately after the

assault, to obtain a complete set of the vital statistics of his assailant. Yet certain serious contingencies suggest themselves. What should be done if the individual wielding the stick nefariously made away with the same before any of its physical properties could be determined? Again, the court fails to explain the victim's duty in case the hardened owner of the stick refused to furnish any statistics as to his size, weight or strength. The argument itself has a familiar ring, and an examination of certain of the writings of that well-known legal authority, Mr. Lewis Carroll, will make it apparent where this Supreme Court learned its logic."

The Alabama case referred to above in which the court insists upon greater particularity in describing the offense, is not the first contribution to the jurisprudence of technicalities delivered by this august tribunal. In 1908 it set aside the conviction of a murderer because the indictment, which contained the usual staggering array of useless verbiage, did not conclude with the sacrosanct formula, "against the peace and dignity of the state."

We cannot too strongly condemn such judicial refinements as these. In the ordinary business transactions of our daily life they have no place. Nowhere except in our judicial procedure do they find a ready acceptance. In some cases they are so grotesque and absurd as to excite well-deserved ridicule from sensible men, lawyers and laymen alike, and more than anything else they are responsible for the widespread popular dissatisfaction with our present methods of administering justice. They tend to impair confidence in the courts, promote and foster lawlessness, diminish respect for the legal profession, and often result in gross denials of justice to those who have a right to look to the courts for protection. J. W. G.

Should Courts Ever be Criticized for Their Decisions?

Our strictures in the preceding note upon the courts for sometimes subordinating justice to technicality through hair-splitting logic and refinements raises the old question as to whether the judiciary should ever be criticized for its decisions. There have always been some who fancied that judges, unlike other mortals, are infallible, and that their judicial conduct ought not to be subject to criticism, certainly not by the laity. But the greatest English and American judges have, themselves, repudiated any such view of the perfection of the judicial office. The great English Lord Chancellor Parker once said: "Let all people be at liberty to know what I found my judgment upon; that, so when I have given it in any case, others may be at liberty to judge of me." The propriety as well as the value of temperate and dispassionate criticism of the decisions